IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges: William B. Murphy, Richard Allen Griffin and Helene N. White

CITY OF TAYLOR,

Plaintiff-Appellee

v

THE DETROIT EDISON COMPANY

Defendant-Appellant.

_____/

Supreme Court No. 127580

Court of Appeals No. 250648

Wayne County Circuit Court
No. 02-221723-CZ

AMICUS CURIAE BRIEF OF
THE TELECOMMUNICATIONS ASSOCIATION OF MICHIGAN
IN SUPPORT OF APPELLANT

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   Amicus Curiae TAM answers "no."

2. Whether this Court should reject the Court of Appeals' governmental/proprietary function test for determining whether a utility can be made to bear the costs of relocating its facilities.

   Amicus Curiae TAM answers "yes."

3. Whether this Court should adopt an alternate test for determining whether a utility can be made to bear the costs of relocating its facilities, and, if so, whether that test should be derived from statutory language granting utilities the right to use public rights-of-way for their facilities.

   Amicus Curiae TAM answers "yes."

I. INTRODUCTION

At issue in this case is whether Appellee City of Taylor ("Taylor") may enforce an ordinance that conflicts with, and bypasses existing state-created schemes regulating electric utilities, and require, as part of an effort to improve a road's appearance, that an electric utility bear the costs of burying its aerial lines. Because members of the Telecommunications Association of Michigan ("TAM") are also subject to state regulation of many of the telecommunications services they provide, those members have a vital interest in this Court's resolution of the issues raised in this appeal. TAM submits this Amicus Curiae Brief in Support of Appellant, The Detroit Edison Company ("Detroit Edison").[1]

The issues presented by Detroit Edison's appeal have major implications for all public utilities and providers of telecommunication services in Michigan, as well as all of their residential and business customers. This appeal presents, inter alia, the question of how right-of-way cost allocation issues arising between municipalities and utilities are properly analyzed and resolved, including whether the Michigan Public Service Commission ("MPSC") is the proper authority to first address such issues, whether the Court of Appeals' governmental/proprietary function test is a workable test for the resolution of such issues, and the circumstances under which a municipality may require that a public utility bear the entire cost of removing and relocating, at the municipality's request, the utility's facilities in the public rights-of-way.

The case below involves a four-mile stretch of Telegraph Road in Taylor. Yet, the case has enormous potential effect for those more than 100,000 miles of telecommunications lines

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[1] TAM's motion to file an amicus curiae brief was granted by this Court on October 6, 2005.

located in public rights-of-way across Michigan. Taylor seeks to require, through an ordinance, that utilities pay for relocation of utility facilities, and do so despite contrary language in MPSC rules and tariffs, and without an adequate demonstration that the public's health and safety – rather than a desire to beautify the neighborhood – necessitates that facilities be relocated. Absent action by the Supreme Court, there would be nothing to prevent each of the hundreds of municipalities in Michigan from following Taylor's lead. The aggregate costs to TAM members and the customers they serve of such relocation expenses could be in the tens of billions of dollars.

As will be discussed in this brief, the Court of Appeals in City of Taylor v Detroit Edison, 263 Mich App 551; 689 NW2d 482 (2004), concluded that Detroit Edison was responsible for paying millions of dollars in relocation costs after applying a test of whether Taylor was engaged in a proprietary or governmental function. In applying its "governmental/proprietary function" test below, the Court of Appeals continued its wayward departure down a path of decisions it started more than 20 years ago. In those decisions, the Court of Appeals has held that if the activity (or project) that prompts a municipality to request that utility facilities be relocated is a governmental function, the utility is solely responsible for the entire expense of relocation. This is a test that this Court has never established or approved for determining responsibility for such relocation expenses, and the governmental/proprietary function distinction is generally regarded as inherently unsound. See, e.g., Indian Towing Co v United States, 350 US 61, 65; 76 S Ct 122; 100 L Ed 48 (1955).

TAM does not argue here that municipalities do not have the right to require that public utilities move their facilities from one location to another within public rights-of-way within the municipality's control. However, the right to require relocation does not mean that such

relocation must always be at the utility's sole expense. TAM requests that this Court reject the Court of Appeals' governmental/proprietary function test – a test that bears no relation to statutes granting utilities a right to use public rights-of-way for their facilities and one that provides no principled limit on municipalities' ability to shift the costs of their own right-of-way management decisions onto a utility's customers.

If this Court concludes that it must adopt a replacement test, TAM further requests that this Court determine that, where cost allocation issues cannot be resolved by application of statutes or other pronouncements that have the effect of law, utilities can be required to pay for relocation expenses only when a municipality can demonstrate that relocation of the utility's facilities in public right-of-way is necessary to accommodate another public use of the right-of-way (e.g., a sewer line, light rail transit) or to protect public health or safety. As this Court has held in other settings, "necessary" should be interpreted to mean "indispensable" or "essential."

Taylor's demand that facilities be relocated was motivated primarily by aesthetics: the record below does not support a finding, and the lower court did not find, that the relocation was indispensable to the public health and safety. As a result, Taylor – rather than utility customers across the state – should be made to bear the costs associated with its desire to beautify its own surroundings.

II. IMPACT OF CASE ON TELECOMMUNICATIONS NETWORKS AND INCUMBENT LOCAL EXCHANGE PROVIDERS IN MICHIGAN

TAM members[2] have invested more than $11 billion to install telecommunications networks throughout Michigan. TAM members collectively have installed about 5.5 million local exchange lines (both wholesale and retail), serving business and residential customers in a geographic area covering approximately 85% of the area of Michigan. The 2004 Annual Report of the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority ("METRO Authority")[3] reports that TAM's thirty-five member ILECs and the two-non member ILECs together have more than 100,000 miles[4] of telecommunications lines and cables located in public rights-of-way.[5] Of these telecommunications facilities in road rights-of-way, approximately 20% are aerial facilities attached to utility poles, often sharing space on the poles with other public utilities and cable television providers as required by Michigan law. The balance of the telecommunications facilities in road rights-of-way are located underground.

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2 The members of TAM include thirty-five incumbent local exchange companies ("ILECs") providing local exchange and other telecommunications services in different areas throughout Michigan. The only ILECs in Michigan that do not belong to TAM are Verizon North Inc. and Peninsula Telephone Co.

3 The METRO Authority was created on November 1, 2002, under Public Act 48 of 2002 ("METRO Act"), MCL 484.3101 et seq, as an autonomous agency within the Department of Consumer & Industry Services. Pursuant to subsequent Executive Order, the Department of Consumer & Industry Services remained as the Department of Labor & Economic Growth and the powers, duties, functions, and responsibilities of the METRO Authority were transferred to the Director of the Department of Labor Economic Growth.

4 The Annual Report expresses this distance as 535,780,715 linear feet at p.12. This figure has been converted to miles in this brief.

5 This number does not include the extensive lines and facilities located in public utility easements found on private land.

These telecommunications lines have been installed over the last one hundred years with the consent or acquiescence of the municipalities with jurisdiction over the streets and highways.

Relocation these facilities is not, as a general matter, easy or inexpensive, and costs can easily total in the millions of dollars (as they do here for Detroit Edison). The task of relocating lines and facilities, whether from an aerial to an underground location or from one underground location to another underground location, is a complex undertaking. Substantial expense would have to be incurred to place new facilities underground and to ensure that those facilities are operational before disconnecting and removing the old facilities or abandoning them in place. TAM's largest member, AT&T Michigan (formerly SBC Michigan), has calculated the average costs to relocate one mile of facilities in a public right-of-way from an aerial to an underground location at approximately $274,000. Given such costs, relocation of facilities is an activity that invariably affects telecommunications services provided to those customers served by the facilities being relocated, as well as to other customers who may be called upon to subsidize, through increased rates, projects undertaken by local governments to which they have no connection.

III. FACTUAL BACKGROUND OF THE CASE

Detroit Edison and other public utilities installed facilities on overhead lines along Telegraph Road years ago in accordance with a long-standing Taylor ordinance that permitted overhead placement of lines along a "major thorofare [sic] right-of-way." (See Appendix 11 to Detroit Edison's Application). The Opinion of the trial court below recites that around the Fall of 1999, Taylor and the Michigan Department of Transportation ("MDOT") were working on a plan for improving Telegraph Road, including the four-mile stretch that ran through Taylor. In early

2000, Taylor asked Detroit Edison and other utilities to relocate their facilities running along Telegraph Road from overhead to underground at the utilities' sole expense. Detroit Edison objected, asserting that under its tariff and MPSC rules, Taylor was required to bear the costs. Meetings were held in March of 2000 between officials of Detroit Edison and Taylor to seek a resolution of the disputed issues, but no agreement was reached.[6]

When Detroit Edison was unwilling to relocate its facilities without agreement by Taylor to reimburse Detroit Edison for the relocation costs, Taylor enacted the ordinance that is at issue in this case. On May 16, 2000, Taylor enacted Ordinance No. 00-344, requiring the relocation of all overhead lines located in the public right-of-way and running along Telegraph Road to an underground location at the utilities' sole expense. (See Appendix 11 to Detroit Edison's Application.) While the "Legislative Findings and Purpose" section in the Ordinance recites several general considerations of public safety, other findings demonstrate that a desire to improve Taylor's aesthetic environment through removal of unsightly overhead lines was a major factor. Indeed, a press release issued by Taylor touted the enactment of the Ordinance for the aesthetic aspects of the project, stating, "the City has instructed utility providers to bury their lines underground in an effort to improve the road's appearance." (See Appendix 10 to Detroit Edison's Application.)

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[6] See City of Taylor Brief in Opposition to Edison's Application for Leave to Appeal for discussion of subsequent meetings that led to an agreement that Taylor would advance certain relocation costs to Detroit Edison without prejudice to and reservation of rights to seek recovery in subsequent litigation.

IV. ARGUMENT

The provision of telecommunication services at a reasonable cost is a matter of statewide concern. The statewide effects of a local government's exercise of control over its public rights-of-way cannot be ignored. To suggest otherwise is to allow municipalities to shift onto others – those not able to use local political processes to express their preferences – the costs of whatever the municipality chooses to do with respect to its rights-of-way. The Court of Appeals' governmental/proprietary function test is an inherently flawed test that fails to impose any principled limit on municipalities' ability to shift costs onto a public utility and its customers. That test should be rejected. If a replacement test must be adopted, that test should emanate from the initial statutory grant to utilities of rights to use public rights-of-way for their facilities. Such a test would maintain municipalities' power to control their rights-of-way, but would allow the municipality to shift onto utilities costs associated with relocation of facilities only where relocation is necessary to the public health and safety or to accommodate other public uses of the space taken up by the utility's facilities.

A. Access To and Control Over Public Rights of Way – The Early Years

1. Michigan Law

Michigan law has long permitted telecommunications companies and other public utilities to place their facilities in public rights-of-way. One of the earliest statutory grants of such authority was made to telephone companies in Section 4 of 1883 PA 129, MCL 484.4, which provides in part that:

> Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets and highways, and across or under any of the waters in this state, with all necessary erections and fixtures therefor: Provided, That the same shall not injuriously interfere with other public uses of the said places, streets and highways, or injure any trees located along the line of such streets or highways nor shall the same interfere with the navigation of said waters, or the running of railway trains; . . . .

Under this provision, telecommunications companies may use public rights-of-way for their facilities, as long as that use does not "injuriously interfere with other public uses of the said places, streets and highways . . . ." The Legislature enacted a similar provision for electric utilities in 1905 PA 264 (the "Foote Act").

When these statutes were enacted, the Michigan Constitution did not include language expressly reserving to local governments authority over their streets and rights-of-way. This changed in 1908, when the then-new Constitution provided that:

> No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

Const 1908, art 8, § 28. Although this provision expanded cities' rights over their streets and public places, it was held not to apply to those utilities having received franchises from the state prior to 1908. As a result, for example, the rights of a number of telecommunication companies to operate their businesses without payment of a franchise fee to local governments remained unchanged. TCG Detroit v City of Dearborn, 206 F3d 618, 626 (CA 6 2000) (rejecting the

argument that the 1908 constitutional grant of power to cities to reasonable control of their rights-of-way abrogated providers' franchise rights under MCL 484.4).

Implementing the new constitutional language, the Legislature enacted 1925 PA 368, MCL 247.172, et seq. Section 13 of this Act, MCL 247.183(1), now provides that:

> Except as otherwise provided under subsection (2), telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.

Section 15 of 1925 PA 368 provides:

> The construction and maintenance of all such telegraph, telephone and power lines, cable television lines, pipe lines, wires, cables, poles, conduits, sewers and like structures shall be subject to the paramount right of the public to use such public places, roads, bridges and waters, and shall not interfere with other public uses thereof and nothing herein contained shall be construed to authorize any telegraph, telephone, power, or other public utility company, cable television company or municipality to cut, destroy, or in anywise injure any tree or shrub planted within any highway right of way or along the margin thereof, or purposely left there for shade or ornament or to bridge across any of the waters of this state. Nor shall anything in this section or [MCL 247.183 and MCL 247.184] be construed to grant any rights whatsoever to any public utilities or cable television companies whatsoever, nor to impair anywise any existing rights granted in accordance with the constitution or laws of this state, but shall be construed as a regulation of the exercise of all such rights.

MCL 247.185 (emphasis added). Because the last sentence in this provision requires that MCL 247.183 and MCL 247.185 are to be considered neither as a grant of rights nor an impairment of

existing rights, any conflict between, for example, MCL 484.4 and MCL 247.185 is to be resolved in favor of the rights granted by MCL 484.4.

2. The Common Law Rule

Early on – before states enacted comprehensive schemes for the regulation of utilities – some courts concluded that, given utilities' acceptance of a franchise and their resultant ability to enter and use public rights-of-way, utilities' use of those rights-of-way had to yield to other public uses. In New Orleans Gaslight Co v Drainage Comm of New Orleans, 197 US 453; 25 S Ct 471; 49 L Ed 831 (1905), one of the earliest cases in this vein, the Supreme Court held that where a drainage commission determined that the utility's facilities must be relocated to accommodate a drainage project, the utility could, under the terms of its franchise, be made to bear the expense of the relocation without violating the Contracts Clause or the Takings Clause of the U.S. Constitution. In New Orleans Gaslight, the grant to the gas company of the exclusive right to supply gaslight included language that its laying of pipes in the city's streets would be so "as to produce the least inconvenience to the city or its inhabitants." Id at 459. As the Supreme Court described:

> It is admitted that in the exercise of this power [of the drainage commission] there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan. . . . It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made.

Id at 460-461. The Supreme Court concluded that:

> In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

Id at 462. This approach to cost allocation between the utility and the local government came to be known as "the common law rule."[7] Some courts have justified this cost allocation scheme on the basis of, inter alia, the utility's free use of the public right-of-way. See, e.g., PECO Energy Co v Pennsylvania Public Utility Comm, 568 PA 39, 47; 791 A2d 1155, 1160 (2002) ("At common law, utilities were permitted to occupy highway rights-of-way without cost but could be ordered by the state or a municipal agency to remove and relocate their facilities, at the sole cost and expense of the utility."); Matter of Consolidated Edison Co of NY v Lindsay, 24 NY2d 309, 318; 248 NE2d 150 (1969) ("Certainly the city should not be required to recompense the company for the loss of a privilege which it obtained without paying the city a penny for its use."). Because the utility was not required to pay for its use of the right-of-way, it could be made to pay for relocating its facilities when relocation was necessary to accommodate other

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[7] As stated by the Court of Appeals in Michigan Bell Telephone Co v City of Detroit, 106 Mich App 690, 695; 308 NW2d 608 (1981):

> At common law, and in most recent cases to consider this issue, the right of the public utility to use public streets is subject to the right of the local government to require the utility to relocate its lines and facilities at its own expense when made necessary by considerations of public health and welfare.

Notably, the Court of Appeals' citation to authority supportive of this principle did not include citation to any of this Court's opinions. Id at 695-696. In fact, this Court has not expressly adopted this, or any other, test or rule to be used in deciding cost allocation issues such as those presented in this appeal.

public uses.

B. Access To and Control Over Public Rights of Way – The Modern Era

Conditions have changed substantially since the establishment of the common law rule. Numerous companies can provide electric, gas, and telephone service (rather than one or only a few companies having a monopoly over such services within their territories). Those companies may differ in terms of their rights vis-à-vis municipalities, due to such factors as when, in relation to the creation of the municipality, the utility obtained rights to use particular land. See, e.g., Sussex Rural Electric Cooperative v Township of Wantage, 217 NJ Super 481, 488; 526 A2d 259, 262 (1987) ("[W]here the utility's right antedates the public's right, it is commonly held that the right of the utility is paramount and that the public can displace the utility only by paying compensation."). Utilities are subject to pervasive state-created regulatory schemes in numerous states, including Michigan. In addition, they can be parties to contractual arrangements with municipalities that also define circumstances under which utilities may be required to pay for relocation of their facilities. Finally, utilities may no longer have "free" access to rights-of-way.

Within one state, utilities providing different services can be subject to differing regulatory schemes. Telecommunications providers in Michigan, for example, are subject to the Michigan Telecommunications Act ("MTA"), MCL 484.2101 et seq, and, as a result, the MPSC has regulatory control over certain of the services that providers offer to customers. Those providers are also subject to the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act ("METRO Act"), MCL 484.3101 et seq, in which the Legislature, in addition to confirming the rights of telecommunications providers to use the public rights-of-way to place

their facilities, established uniform right-of-way maintenance fees and standardized municipal permitting processes. Thus, telecommunications providers in Michigan are among those no longer having "free" use of rights-of-way – they are required to pay a maintenance fee that is collected by the state and distributed to municipalities in order to defray the costs associated with placement of facilities in those rights-of-way. MCL 484.3108; MCL 484.3110.

The result of all these changes is that assessment of whether a particular utility can be forced to pay for relocating its facilities is no longer a relatively simple matter of mechanically applying a rule or test, and in particular, cannot be a matter of applying a test that bears no relation to the statutes or other mechanisms that define the rights of utilities vis-à-vis municipalities. Instead, careful consideration must be given to each of the possible mechanisms (e.g., common law, legislation, tariffs, franchises, agency rules, and utility/municipality contracts) that can be relied upon to define and shape the rights of utilities vis-à-vis municipalities.

C. Legislation And Other Pronouncements Having The Force Of Law Place Limitations On Cities' Reserved Power

Because statutes and other pronouncements having the force of law can place limits on a municipality's power to regulate utilities, those pronouncements must be given careful consideration when assessing a city's attempts to regulate utilities. As the existence of state-created regulatory schemes attests, the services that utilities provide and the costs of those services are matters of state-wide concern. At a minimum, the cities' power over its rights-of-way must be exercised consistently with provisions enacted by the Legislature and with other

pronouncements that have the force of law.[8] Where the city's exercise of control over its streets conflicts, or is inconsistent with existing law, it cannot be deemed "reasonable." It is instead outside the scope of the city's authority. Thus, although cities have, by virtue of Const 1963 art 7, § 29, the ability to exercise "reasonable control" over their streets and highways, that power does not necessarily include the ability to shift costs of relocation of utility facilities onto utilities.

As did the 1908 Constitution, Article 7, Section 29 of the 1963 Constitution again requires that a utility first obtain the consent of the municipality before placing its wires and poles in the public rights-of-way. Section 29 provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Const 1963, art 7, § 29. Thus, the Michigan Constitution continues to grant cities the power to give or withhold consent to certain utilities (i.e., those having received franchises from the state

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[8] Although it is frequently held that cities may not bargain away their police power, see, e.g., New Orleans Gaslight Co, 197 US at 460, this is not necessarily a limitation on a city's ability to negotiate agreements with utilities regarding the allocation of costs associated with relocating utility lines. The issue of whether the utility will move its lines at the request of the municipality is analytically distinct from the issue of how the costs associated with moving those lines will be allocated. Thus, while a city may not be able to bargain away its ability to enact ordinances that it deems necessary to serve public health or safety and that require that a utility's lines be relocated a direct result, it may bargain over issues related to the allocation of costs associated with that relocation of utility facilities. As a result, contractual agreements regarding cost allocation may pose additional limitations on cities' ability to force a particular utility to pay relocation costs.

prior to 1908 are not subject to the "consent" requirement) wishing to use cities' highways, streets, alleys or other public places for their facilities. The power to withhold consent is limited in that cities are precluded from withholding consent "unreasonably" or "arbitrarily." See, e.g., Union Twp, Isabella County v City of Mt Pleasant, 381 Mich 82; 158 NW2d 905 (1968); TCG Detroit v City of Dearborn, 261 Mich App 69; 680 NW2d 24 (2004). There was no dispute below that Detroit Edison obtained Taylor's consent when it installed its facilities along Telegraph Road many years ago, (see Appendix 11 to Detroit Edison's Application), and consent to Detroit Edison's use of Taylor's rights-of-way along Telegraph Road was not an issue below in this case.

The Michigan Constitution also reserves to local governments "reasonable control" of their streets and highways "except as otherwise provided in this constitution." As this Court has noted:

> The right to reasonable control of their streets is not a gift of an arbitrary prerogative to the cities, villages and townships. The reasonableness of the city's control of its streets is not to be within the final determination by the city in all cases, for that in practical effect could erase the word "reasonable" from the constitutional provision.

Allen v Ziegler, 338 Mich 407, 415-416; 61 NW2d 625 (1953).[9] Whether a city's exercise of

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[9] See also People v McGraw, 184 Mich 233, 237; 150 NW 836 (1915), in which this Court quoted the Proceedings and Debates of the Constitutional Convention (page 1433, vol 2) associated with 1908 Constitution's inclusion of new language regarding local governments' reserved rights:

> The word "reasonable" was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways, and public places within their corporate limits. And it was pointed out in the debates that without the word "reasonable," or a similar qualification, the section would practically deprive the state itself of authority over its highways and public places.

power over its streets and public places is reasonable is assessed on a case-by-case basis. See, e.g., City of Trenton v Wayne County Board of Road Comm'rs, 116 Mich App 212, 218; 323 NW2d 340 (1982) ("Whether a given municipal action constitutes an exercise of reasonable control must be determined on a case by case basis.").

Limitations on cities' control over their streets can come in the form of legislation and other pronouncements that have the force of law. Const 1963, art 7, § 22 provides that "each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law." This language limits a city's ability to "regulate" or "control" its "municipal property" through resolutions and ordinances, because those ordinances are "subject to the constitution and law." The combination means that the city's exercise of control over its streets and highways cannot directly conflict with the legislature's general acts on topics of state-wide concern or with other similar pronouncements that have the force of law (e.g., validly promulgated agency rules; see Douglas v Edgewater Park Co, 369 Mich 320, 331, 332; 119 NW2d 567 (1963)). People v McGraw, 184 Mich 233; 150 NW 836 (1915); City of Muskegon v Drost, 353 Mich 691; 91 NW2d 851 (1958); Detroit Edison v Township of Richmond, 150 Mich App 40, 47; 388 NW2d 296 (1986).

Despite the seemingly broad reservation to cities of reasonable control over their streets and highways in Const 1963, art 7, § 29, it is unlikely that a city could, for example, enact an ordinance that expressly allows utilities to hang their lines across city streets at a height of ten feet. Such an ordinance would conflict directly with MCL 247.186, which prohibits wires to be placed or permitted to remain "at less height than 15 feet above any part of the traveled portion of the road." Similarly, because the Transmission of Electricity Through Highways Act, MCL

460.551 et seq, grants specific powers to the MPSC to regulate the transmission of electricity, the Township of Richmond was without power to enact, in the guise of a zoning ordinance, restrictions on the minimum width of any extra-high-voltage transmission line corridor, the minimum distance of the line from dwellings, and the maximum noise levels for the line. Detroit Edison v Township of Richmond, 150 Mich App 40, 49-50; 388 NW2d 296 (1986). See also Green v Dearborn Municipal Court, 31 Mich App 591; 188 NW2d 98 (1971) (holding ordinance invalid to the extent that it conflicted with state law); Detroit, Wyandotte & Trenton Transit Co v City of Detroit, 260 Mich 124, 129; 244 NW 424 (1932).

D. The City's Reserved Constitutional Powers Over Its Streets Does Not Invariably Allow The City To Shift Costs Of Relocating Utility Lines To Utilities

At issue in this case is whether Const 1963, art 7, § 29 invariably allows Taylor and other cities to shift by ordinance the costs of relocating utility equipment to the utility where relocation is requested as a result of a road beautification project. There is apparently no dispute that Taylor has the power to request or even require that Detroit Edison's lines be buried, i.e., this is not a case about Taylor's authority to decide where lines should be located. The dispute is primarily whether Taylor may by ordinance also require Detroit Edison to pay for the lines to be placed underground. The particular ordinance sought to be enforced in this case was enacted after Detroit Edison informed Taylor that under Detroit Edison's applicable tariff and existing MPSC rules, Taylor had to pay for lines to be buried.

1. Funding Of City Projects Is First And Foremost The Responsibility Of The City

Article 7, Section 29 is silent with respect to whether a municipality may impose relocation costs on a utility. It is an inescapable fact that, in general, the funding of street or right-of-way maintenance or of projects involving a municipality's rights-of-way is the responsibility of the municipality (or other entity charged with the responsibility for the particular street or property at issue). Cf Arrowhead Development Co v Livingston County Road Comm, 413 Mich 505, 520; 322 NW2d 702 (1982) (noting that "the regrading of a county road adjacent to a new subdivision development, in order to safely accommodate traffic generated by the new community, is a public obligation. A legislative intention to impose such a burden upon a nearby private developer would be a notable departure from the historic manner of funding alterations to public property, . . ."). That a city (or other governmental entity having responsibility for the streets) has primary responsibility for costs associated with right-of-way improvements and street maintenance is consistent with the general principle that the costs associated with a public good (e.g., smooth, safe streets) are to be borne by the public that is to benefit from that good.

2. Article 7, Section 29 Does Not Include An Implied Power To Force The Costs Of Public Improvements Onto Private Entities

With funding of street maintenance and right-of-way improvements the responsibility of the local government "controlling" those streets and rights-of-way, the issue becomes whether a municipality's "control" over its streets under art 7, § 29 includes an implied power to force

others – in this case utilities – to pay for part of the costs associated with right-of-way projects. This Court's decisions, while not expressly addressing the constitutional question raised in this appeal, strongly suggest that art 7, § 29 does not grant to cities a constitutionally protected "right" to shift to utilities the costs associated with relocation of utility facilities given city-initiated projects involving its property.

For example, in City of Center Line v Michigan Bell Telephone Co, 387 Mich 260; 196 NW2d 144 (1972), this Court was faced with the question whether Michigan Bell was entitled to reimbursement of costs associated with relocating its equipment in connection with an urban renewal project. The City of Center Line relied on cases following the common law rule to argue that Michigan Bell was not entitled to reimbursement. The Court of Appeals concluded that Michigan Bell was entitled to payment, for each of two reasons. The second reason[10] given by the Court of Appeals was that "[s]ince Urban Renewal is a 'socially orientated [sic] program operating under the guise of the police power' the burden of its costs should be borne by the general taxpaying public, and unless the utility be reimbursed by the condemning authority, the rate paying users of the utility will ultimately bear the cost." Id at 264. As to this reason, this Court stated:

> The second reason is sound, although its expression may be unfelicitous. Whether it is "inappropriate" for the rate payers to pay these costs or whether they "should" be borne by the general taxpaying public are legislative rather than judicial judgments.

387 Mich at 265. This Court went on to find that the Legislature had made such a judgment in the Rehabilitation of Blighted Areas Act, and affirmed the Court of Appeals' conclusion that

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[10] The first, which was rejected by this Court, was that the land condemned was to be made available to a private developer, who would then benefit by Michigan Bell's loss.

Michigan Bell was entitled to reimbursement.[11]

This Court's Center Line decision suggests that, while art 7, § 29 reserves to cities the power to make decisions with respect to their rights-of-way, particularly with respect to purely local matters, it does not also provide a constitutionally protected right invariably to shift the costs of relocating lines onto a utility. Who bears such costs is a decision that the Legislature may make through its enactments, Center Line, 387 Mich at 265, without thereby violating the Constitution. Other decisions of Michigan courts are consistent with the principle that the Legislature, in regulating utilities, may enact laws that operate to limit cities' exercise of their art 7, § 29 powers. See, e.g., TCG Detroit v City of Dearborn, 261 Mich App 69; 680 NW2d 24 (2004) (rejecting challenge, on art 7, § 29 grounds, to (now repealed) provisions within the Michigan Telecommunications Act limiting fees cities could charge telecommunications providers for access to municipal rights-of-way). As the Court of Appeals concluded in TCG Detroit, "Just as the state has the power to set rates, and thereby set the outside parameters of a city's powers to contract, it has the power to set the fees that can be charged nonlocal businesses, and the [MTA's] imposition of a fixed and variable cost fee structure does not impinge on a city's right to the reasonable control of its streets." Id at 95.

Because the Legislature may make such determinations, it follows that the Legislature may delegate its authority to make such determinations to agencies responsible for regulating utilities.

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[11] As a result of this Court's disposition affirming the Court of Appeals' conclusion that Michigan Bell was entitled to compensation, it was unnecessary to address Michigan Bell's arguments that the Contract and Takings Clauses of the Michigan and U.S. Constitutions required that Michigan Bell be compensated for relocating its lines. 387 Mich at 266.

E. The Legislature Has Given The Michigan Public Service Commission Authority Over Issues Involving Local Control Of Rights-Of-Way Used By Telecommunications Providers

Giving the issue only cursory attention, the Court of Appeals concluded that Taylor's ordinance "is not in direct conflict with the statutory scheme." City of Taylor v Detroit Edison Co, 263 Mich App at 561. TAM does not here present arguments demonstrating the Court of Appeals' error in reaching this conclusion, leaving those arguments to Detroit Edison and others more familiar with the vast array of rules and statutory provisions that govern electric utilities.

TAM instead simply notes that, with respect to telecommunications providers, the METRO Act is another example of the Legislature's delegation to the MPSC of authority to regulate local government's ability to exercise control over utilities' use of public rights-of-way. With the METRO Act, the Legislature has expressly set forth a limitation on certain local governments' power to enact ordinances:

> Except as otherwise provided by this act, after the effective date of this act, a municipality in a metropolitan area shall not enact, maintain, or enforce an ordinance, local law, or other legal requirement applicable to telecommunication providers that is inconsistent with this act or that assesses fees or requires other consideration for access to or use of the public rights-of-way that are in addition to the fees required under this act.

MCL 484.3104(1). The METRO Act mandates that telecommunications providers seeking access to, or use of, a municipality's rights-of-way apply for, and obtain a "permit" from the municipality. MCL 484.3105; MCL 484.3115. These "permits" are, in the main, multi-year agreements that set forth the terms and conditions under which the provider may have access to, and use of, public rights-of-way. MCL 484.3115(4) ("Any conditions of a permit granted under this section shall be limited to the provider's access and usage of any public right-of-way."). The

METRO Act expressly gives the MPSC responsibility for prescribing the application form, the process to be used in applying for a permit to use the public rights-of-way, and "default" permit provisions, MCL 484.3106(1); for resolving disputes between providers and municipalities with respect to the terms of the permit, MCL 484.3106(2); for resolving other disputes arising between municipalities and providers, MCL 484.3107; and for hearing and deciding cases alleging violation of the METRO Act. MCL 484.3118. To the extent that responsibility for costs of relocation of a telecommunication provider's facilities are the subject of the permit issued to the provider, the MPSC would have authority over disputes arising between municipalities and the provider regarding those costs and the applicability of permit provisions to any particular circumstance.

F. The Court Of Appeals' "Governmental/Proprietary Function" Test Must Be Rejected

Having rejected the notion that the existing MPSC rules, Detroit Edison's tariff, or the general regulatory scheme governed the question of whether Taylor could force Detroit Edison to pay relocation costs, the Court of Appeals proceeded to apply its governmental/proprietary function test – a test that is divorced from the existing statutory framework. This test has never been adopted by this Court as a means of assessing who bears the responsibility for relocation costs, and TAM urges this Court to reject that approach.

1. Development Of The Court Of Appeals' Governmental/Proprietary Function Test

The Court of Appeals has issued a number of decisions that have assessed who bears responsibility for utility relocation costs. In the main, those decisions look at whether the project in question undertaken by the municipality represents a "proprietary or governmental function." If the project is considered proprietary, the municipality must pay for relocation and if governmental, the utility must bear the cost.

The first case in which the Court of Appeals addressed cost allocation issues outside the urban renewal setting was City of Pontiac v Consumers Power Company, 101 Mich App 450; 300 NW2d 594 (1980). In this case, the City of Pontiac requested that Consumers Power remove and relocate two electric power lines from the west side to the east side of Johnson Avenue to facilitate construction and renovation of Pontiac General Hospital. The trial court required Consumers to bear the cost of relocation expenses. On appeal, the Court of Appeals reversed, relying on the following authorities:

> McQuillin, Municipal Corporations, § 34.74(a), 184 states the general principle in utility relocation cases. Relocation costs must be borne by the utility if necessitated by the City's discharge of a governmental function, whereas the expenses must be borne by the city if necessitated by its discharge of a proprietary function. Whether the utility has located its transmission facilities by virtue of an easement, franchise, plat, or other grant is irrelevant; all are treated identically.
>
> *Detroit Edison Co v Detroit*, 332 Mich 348; 51 NW2d 245 (1952), involved the relocation of an electric transmission line necessitated by the construction of a city sewer system, a function then, as now, held to be governmental in nature. The Court in that case held that the relocation costs must be borne by the utility company.

101 Mich App at 453-454.

The Court of Appeals' adoption of the "governmental/ proprietary function" test was not at this Court's direction. Although the Court of Appeals looked to Detroit Edison Co v City of Detroit, 332 Mich 348; 51 NW2d 245 (1952), for support, in that case Detroit Edison had conceded that it could be required to remove and replace its poles at its own expense to permit construction of a public sewer, if its poles had been erected under its franchise rights. 332 Mich at 352. The issue before the Detroit Edison v City of Detroit Court was whether the utility was responsible for relocation costs where its rights were by easement, rather than by franchise. Thus, this Court did not directly address the constitutional questions posed here, and certainly did not adopt the governmental/proprietary function test.

The Court of Appeals in City of Pontiac, 101 Mich App 450, then cited the Supreme Court case of Parker v City of Highland Park, 404 Mich 183; 273 NW2d 413 (1978),[12] which found that the day-to-day operation of a public hospital was not a governmental function for purposes of Section 7 of the Government Tort Liability Act, MCL 691.1407. Because the relocation of the facilities required by Pontiac was for the operation of a public hospital, the Court of Appeals determined that it was a proprietary function, and required the City of Pontiac to bear the costs of relocation of the utility's facilities.

This case started the Court of Appeals down a path that was not supported by holdings of this Court on the relevant issues in at least two ways. First, this Court has never approved or used the proprietary/governmental function test to determine responsibility for utility relocation costs. This is borne out by the fact that there are no Michigan Supreme Court cases cited in the McQuillin treatise for the "governmental function vs. proprietary function distinction" as

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[12] Parker was impliedly overruled by this Court in Ross v Consumers Power Co (On Rehearing), 420 Mich 567; 363 NW2d 641 (1984). See Hyde v University of Michigan Board of Regents, 426 Mich 223, 231; 393 NW2d 847 (1986).

determining whether the utility had a right to reimbursement of relocation expenses. The current edition of McQuillin cites only the Court of Appeals decisions of Detroit Edison Co v Southeast Michigan Transportation Authority (SEMTA), 161 Mich App 28; 410 NW2d 295 (1987), appeal denied Apr 7, 1988, and Michigan Bell Telephone Co v City of Detroit, 106 Mich App 690; 308 NW2d 608 (1981), which are discussed below. These two decisions in turn rely largely on City of Pontiac v Consumers Power, 101 Mich App 450, as establishing the applicable rule.

Second, as discussed above, in Detroit Edison v City of Detroit, 332 Mich 348, this Court did not have to decide the precise question presented here, in large part because of Detroit Edison's concession, 332 Mich at 352, that it could be required to pay relocation costs associated with construction of a sewer unless its purported distinction between franchise and easement rights was recognized.

The next Court of Appeals case to consider responsibility for utility relocation expenses was Michigan Bell Telephone Co v City of Detroit, 106 Mich App 690; 308 NW2d 608 (1981). Here Michigan Bell brought an action against Detroit, seeking compensation for certain easements located in streets and alleys vacated by Detroit for construction of a sewage treatment facility. The trial court granted summary judgment for Michigan Bell, holding the reimbursement of relocation expenses was required. The Court of Appeals reversed, citing City of Detroit v Fort Wayne & E Ry Co, 90 Mich 646; 51 NW 688 (1892), for the proposition that the franchise granted to the railway company to use the street was subordinate to the general power of the municipality over its streets. The Court of Appeals stated:

> At common law, and in most recent cases to consider this issue, the right of the public utility to use public streets is subject to the right of the local government to require the utility to relocate its lines and facilities at its own expense when made necessary by considerations of public health and welfare.

106 Mich App at 695 (emphasis added). Despite enunciating a version of the "common law rule" – which includes no reference to "governmental" or "proprietary" functions – the Court of Appeals in Michigan Bell Telephone Co v City of Detroit launched into a discussion of what is a proprietary or governmental function. The Court noted that construction of a sewer facility was a governmental function, citing Beauchamp v Saginaw Twp, 74 Mich App 44, 253 NW2d 355 (1977), and distinguished Michigan Bell Telephone Co v City of Detroit from the situation presented in Center Line v Michigan Bell, where relocation was required to make way for an urban renewal project. The Michigan Bell Telephone Co v City of Detroit Court characterized the urban renewal project in Center Line v Michigan Bell as amounting to a condemnation for a proprietary function rather than a governmental function. This conclusion was reached despite the Center Line Court's express statement that:

> The *controlling* purpose of the city's plan is to rehabilitate a blighted area. The property is acquired, not for the purpose of redevelopment at a profit to the city or any private developer, but to protect the health, safety, morals and general welfare of the municipality.
>
> Since the controlling purpose is a public use, the circumstance of a private developer's benefit would not change its character.

Center Line, 387 Mich at 265 (emphasis in original).

The next case in which the Court of Appeals applied its governmental/proprietary function test was Detroit Edison Co v Southeast Michigan Transportation Authority ("SEMTA"), 161 Mich App 28; 410 NW2d 295 (1987). That case arose out of the construction of the "People Mover" in City of Detroit streets. As a result of this project, certain of Detroit Edison's facilities had to be removed and relocated. Detroit Edison was willing to relocate the facilities, but demanded that SEMTA bear the cost of relocation. The Court of Appeals quoted from and

adopted the lower court's opinion as its own, concluding that no reimbursement of relocation costs was required. The trial court cited with approval City of Pontiac v Consumers Power and its statement that, in the utility relocation cases, the cost must be borne by the utility if necessitated by the city's discharge of a governmental function. The SEMTA Court rejected the arguments that the construction of a mass transit system was a proprietary and not a governmental function.

Next came Detroit Edison Co v City of Detroit, 180 Mich App 145, 446 NW2d 615 (1989) ("Detroit Edison -1989"), appeal denied Apr 30, 1990, which presented the question of whether Detroit Edison was responsible for costs to relocate certain facilities in connection with Detroit's expansion of the Cobo Hall Convention Center. The trial court granted the City of Detroit's motion for summary disposition on the basis that the expansion of Cobo Hall represented the exercise of a governmental function and not a proprietary function. The Court of Appeals affirmed, citing City of Pontiac v Consumer's Power and Michigan Bell Telephone Co v City of Detroit for the general proposition that the question turns on whether the project for which the utility must relocate is deemed to be a proprietary or governmental function. In answering this question, the Court of Appeals looked at Section 13 of the Government Tort Liability Act, MCL 691.1413, and this Court's decision in Hyde v University of Michigan Board of Regents, 426 Mich 223; 393 NW2d 847 (1986). In Hyde, this Court determined a proprietary function was one in which (1) the activity must be conducted primarily for the purpose of producing a pecuniary profit, and (2) cannot normally be supported by taxes or fees. Noting that Cobo Hall had never operated at a profit and required Detroit to make up a deficit from its general fund for the operating budget of Cobo Hall, the Court of Appeals found that the operation, and (thus expansion) of Cobo Hall, was not a proprietary (for profit) function.

In Detroit Edison Co v City of Detroit, 208 Mich App 26; 527 NW2d 9 (1994) ("Detroit Edison – 1994"), the issue presented was whether a utility must be reimbursed for the cost of relocating its equipment from within certain public rights-of-way that were vacated in conjunction with an economic development project. The City acquired private lands by condemnation for the purpose of transferring the land to Chrysler Corporation for use in the Chrysler Jefferson Avenue assembly plant redevelopment. The Court of Appeals held that the project was for a "public purpose" and found this Court's decision in Poletown Neighborhood Council v Detroit, 410 Mich 616; 304 NW2d 455 (1981), , to be controlling.[13] Citing Detroit Edison Co v City of Detroit, 180 Mich App 145, 446 NW2d 615 (1989) (Cobo Hall expansion) (which in turn cited City of Pontiac v Consumers Power Co), the Court in Detroit Edison – 1994 repeated the now familiar litany that relocation costs must be borne by the utility if the municipality's project was within its discharge of a governmental function. The Court of Appeals equated "public purpose" with a governmental function, stating:

> Because the land clearance was necessary for a public purpose, and was undertaken pursuant to the EDCA, we conclude that the relocation was necessitated by the city's discharge of a governmental function.

208 Mich App at 30.

As noted above, this Court has never adopted or approved of the governmental/proprietary function test for resolving cost allocation disputes between utilities and municipalities. Indeed, in several of the decisions described above the Court of Appeals fundamentally misinterpreted or misapplied this Court's decisions in the process of reaching its conclusions with respect to relocation cost issues. In addition to the mischaracterization of this

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[13] Poletown was overruled by County of Wayne v Hathcock, 471 Mich 445; 684 NW2d 765 (2004).

Court's Center Line opinion, for example, the Court of Appeals in SEMTA, 161 Mich App 28, and Detroit Edison - 1994, 208 Mich App 26, quoted Justice O'Hara's dissenting opinion in City of Detroit v Michigan Bell Telephone Co, 374 Mich 543; 132 NW2d 660 (1965), with the implication that it represented the majority view of this Court. Such mischaracterizations only lend support to the conclusion that the Court of Appeals' governmental/proprietary function test should be rejected.

2. The Court of Appeals' Approach Ignores The Effect Of Legislative Acts On A City's Reserved Powers

The Court of Appeals below continued its reliance on the governmental/proprietary function test in addressing cost allocation disputes. In focusing primarily on an asserted distinction between instances in which a municipality's acts represent a governmental function and those in which those acts reflect a proprietary function, the Court of Appeals ignored or otherwise minimized the effect on a city's control over its rights-of-way of legislative enactments and other pronouncements having the force of law. Rather than examine carefully whether Taylor's power to shift costs onto a utility has been limited in this particular case, the Court of Appeals instead looked for whether the state had "occupied the field" regarding the location of power lines (a point not seemingly at issue in the case) or the allocation of related costs. City of Taylor v Detroit Edison Co, 263 Mich App at 557. Finding that state had not "occupied the field," the Court of Appeals dismissed the applicability of MPSC rules (and seemingly ignored Detroit Edison's tariff entirely, concluding that "[t]he case does not directly involve utility rate structures, licensing, or tariffs," id at 555) and addressed whether Taylor's project was undertaken for a "public" or "governmental" purpose.

The danger in this approach is obvious: where a municipality's power to exercise control over its rights-of-way has been limited, whether the city's action is taken for governmental or proprietary purposes is not the issue. The issue is instead whether the city's act is consistent with, or within the boundaries supplied by, existing law. If it is not within those boundaries, then even if the city's act can be characterized as "for governmental purposes," it cannot stand.

3. This Court Should Reject The Court of Appeals' Governmental/Proprietary Function Test

The governmental/proprietary function test has been repeatedly criticized as unworkable and simplistic, see, e.g., Indian Towing Co v United States, 350 US 61, 65; 76 S Ct 122; 100 L Ed 48 (1955) (describing the governmental/proprietary distinction as a "quagmire that has long plagued the law of municipal corporations" and as a rule that is "inherently unsound"); Dearden v City of Detroit, 403 Mich 257, 261; 269 NW2d 139 (1978) (acknowledging that proprietary function vs. governmental function test had been criticized as the use of "inappropriately simplistic labels"). It has been rejected by numerous courts, including those facing cost allocation issues similar to those presented here. See, e.g., City & County of Denver v Mountain States Telephone and Telegraph Co, 754 P2d 1172, 1176 (Colo 1988) (concluding that "the governmental/proprietary distinction has no continuing validity in the context of utilities relocation law"); Northwest Natural Gas Co v City of Portland, 300 Or 291, 302; 711 P2d 119, 126 (Ore 1985) ("We conclude that the governmental/proprietary distinction is equally unworkable, untenable and unhelpful in deciding mass transit/utility relocation cases."). For the reasons stated above, TAM urges this Court to also reject this test.

G. If Another Test Must Be Established, This Court Should Adopt A Version Of The Common Law Rule

If this Court concludes that it must adopt another test to replace the governmental/proprietary function test, TAM further urges this Court to take its cue from existing statutory language and fashion a test that is consistent with legislative statements regarding utilities' rights and obligations with respect to placing and maintaining their facilities in public rights of way. Such a test would be similar to the common law rule described above.

1. MCL 484.4 Provides A Basis For A Cost-Allocation Rule

MCL 484.4 provides one of the first legislative statements regarding utility rights of access to, and use of, public rights-of-way, and, as noted above, continues to define the rights of some telecommunications providers that operate in Michigan today. As a result, it provides a basis for a rule for determining who should bear the responsibility for relocation costs, particularly if this Court chooses to adopt a single rule rather than rules that are utility or provider specific.

Under MCL 484.4, a provider's use of those rights-of-way is limited only to the extent that it may not "injuriously interfere with other public uses of the said places, streets and highways . . . ." MCL 484.4. Applied to cost allocation issues, this limitation would suggest that

a utility must bear the expense of relocation only in those instances in which its facilities "injuriously interfere[s] with other public uses" of the right-of-way, streets, or highways.[14]

The import of these provisions is that a utility cannot maintain its lines where they are placed and can be made to pay for their relocation when, for example, the space occupied by those lines is required for other public purposes, and the existence of the lines in their current location "injuriously interfere[s]" with those purposes. Application of this type of rule to fact patterns presented in earlier Court of Appeals cases would likely mean that a utility could be required to pay for relocation of facilities where relocation is essential (not merely convenient) to accommodate construction of a public hospital, sewer lines, light rail transit, and other such "public uses" of the space then occupied by the utility's facilities. Similarly, where it is shown that the public health or safety necessitates that a utility relocate its lines, the utility can be said to "injuriously interfere" with the public's use of the streets. Thus, for example, where it can be demonstrated that the lines interfere with the ability of fire trucks to gain access to buildings, Monroe v Postal Telegraph Co, 195 Mich 467; 162 NW 76 (1917), the utility may be required to relocate its lines.

TAM urges this Court to rule that, in order to shift costs of facility relocation onto the utility, a city project be necessary to protect public health, safety and welfare, with "necessary" being something more than preference, desire or convenience of the municipality. In another context, the Supreme Court has had to consider what is meant by "necessary." In Durant v State Board of Education, 424 Mich 364; 381 NW2d 662 (1985), the Court had to decide the meaning of "necessary" as used in the phrase "necessary costs" found in Const 1963, art 9, § 29 and in

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[14] Other statutory language governing telecommunication providers is similar. MCL 247.185, for example, provides that construction and maintenance of telephone lines "shall not interfere with other public uses . . . ."

MCL 21.233(6). The plaintiffs argued that "necessary" should be viewed as "useful or beneficial;" the defendants urged the interpretation to be that which is "essential or indispensable." The Supreme Court adopted the second view, concluding:

> We, therefore, affirm the Court of Appeals determination that the voters, in the use of the term "necessary," intended to provide funding which was essential or indispensable, rather than that which was merely useful or beneficial.

424 Mich at 391. Applied here, the municipality must be able to show that the relocation is "essential" or "indispensable" to the completion of the public project in order to require the utility to pay for the expenses.

2. The Cost Allocation Rule Should Require Municipalities To Bear The Costs Of Relocation For Aesthetic Reasons

Under the above rule, where a utility is asked simply to shift from using aerial lines to using underground lines within the same general location in the right-of-way, with no demonstration that the aerial lines are "injuriously interfering" with "other public uses" of the area in which the aerial lines are located, the utility cannot be made to bear the expense of relocating its lines. A municipality's decision to request that a utility bury its lines for primarily aesthetic reasons is nothing more than a decision to change, without apparent need to eliminate injury to the public health or safety, the terms of the grant of permission to use the right-of-way. The right-of-way accommodates the same uses as before, and the request to bury line is not for the purpose of eliminating an "injurious interference." Instead, relocation is required for the purpose of enhancing the appearance of the right-of-way and surrounding areas.

Other courts considering the question have recognized that, where relocation of a utility's facilities is for aesthetic purposes (or for reasons other than public necessity), the traditional rule that utilities bear the expense of the relocation does not apply. For example, the New Mexico Supreme Court in City of Albuquerque v New Mexico Public Regulation Commission, 79 P3d 297, 301 (2003), observed that:

> [T]his common law rule of requiring utilities to relocate at their own expense extends only to improvements or municipal projects undertaken out of public necessity. See 12 Beth A. Buday & Dennis Jensen, *The Law of Municipal Corporations* 34.74.10, at 224 (3d ed., rev.1995) ("The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity.") [hereinafter *The Law of Municipal Corporations*]. "[I]f the relocation is not necessary to maintain or improve street conditions, the municipality must pay the costs." *Id.* at 225. Although "aesthetic considerations alone do justify the exercise of police power," *Temple Baptist Church*, 98 N.M. at 144, 646 P.2d at 571; see 3-49-1(C) (authorizing municipalities to provide for "beautification" of streets), a municipal improvement project that is based on aesthetics rather than public health and safety will not trigger the common law rule of requiring utilities to bear the expense of relocation.

See also Northern States Power Co v City of Oakdale, 588 NW2d 534, 542 (Minn Ct App 1999) (concluding that, while cited zoning cases "reflect the position that aesthetic considerations will not invalidate an otherwise valid ordinance, none stand for the proposition that a city may regulate a public utility solely for purposes of convenience and aesthetic value. We decline the invitation to extend the law with respect to municipal regulation of public utilities, and instead apply the more traditional public interest tests of public health, safety, and general welfare."). The New York Supreme Court, Appellate Division, in Rochester Telephone Corporation v Village of Fairport, 84 AD2d 455; 446 NYS2d 823, 826 (1982), held that the utility should not

be made to bear the expense of undergrounding its lines, concluding that the municipality's request to underground the utilities lines was outside the scope of necessity and:

> was done by defendant without any reciprocal benefit to plaintiff not as a matter of regulation but to provide an amenity for beautification of a single-family residential area of the community at plaintiff's expense. No doubt the undergrounding improved the area but the "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co v. Mahon*, 260 US 393, 416 (Holmes, J.), supra).

The limitation on the applicability of the common law rule to circumstances where the public health or safety require relocation of utility lines is consistent with this Court's prior statements regarding aesthetics as a motivating factor in fashioning zoning restrictions. Detroit Edison v City of Wixom, 382 Mich 673; 172 NW2d 382 (1969), for example, involved a challenge to the validity and enforceability of a municipal zoning ordinance amendment to prohibit construction of utility towers in excess of 100 feet in height. Detroit Edison had obtained MPSC approval for the construction of 130 foot high towers and had completed a substantial part of the transmission line in question before the ordinance amendment. This Court reversed the Court of Appeals and remanded the case with the direction to the trial court to enter an injunction against the enforcement of the ordinance. Two justices found Detroit Edison had a non-conforming prior use; four justices found Detroit Edison had vested property rights to which the ordinance could not be properly applied. In concluding that Detroit Edison's vested rights outweighed the interests of the city, four justices concluded that:

> It may be conceded that, in implementing the plan apparently contemplated by the framers of this ordinance, aesthetics may be a valid consideration; but such consideration must be merely an incident and not the moving factor. *Wolverine Sign Works v. City of Bloomfield Hills* (1937), 279 Mich. 205 [271 NW 823]; *Hitchman v Township of Oakland* (1951), 329 Mich. 331 [45 NW2d 306]. While we are not insensitive to the disruptive and

> unsightly effect which the proposed towers and lines may have upon the scenic beauty of the Wixom area, we cannot sustain the ordinance for purely aesthetic reasons or unsupported fears of the City planners. The ordinance to the extent that it is predicated upon an exclusively aesthetic basis is held to be invalid.

382 Mich at 692 (Kavanagh J.) (emphasis added).

3. Application Of The Above Rule To This Case

The record below[15] supports a conclusion that Taylor wanted the overhead utility lines along Telegraph Road removed and placed underground largely for aesthetic reasons, and not as an essential or indispensable part of a project designed to improve public health or safety. There was no evidence that any portion, let alone the entire four-mile stretch of Detroit Edison's lines ordered buried in fact posed any particular danger. See Rochester Telephone Corporation v Village of Fairport, 84 AD2d 455; 446 NYS2d 823, 826 (1982) (noting that while a few poles may have needed to be removed for safety reasons, this was not sufficient to justify relocating all the poles and lines ordered relocated); cf New Orleans Gaslight Co, 197 US at 460 ("It is admitted that in the exercise of this power [of the drainage commission] there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan."). The record supports a finding that the ordinance and its recitations of public safety considerations were an after-the-fact rationalization developed by Taylor for its Telegraph Road beautification project after Detroit Edison asserted a legal basis for its refusal to pay for burying its lines.

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[15] The case was decided on motions for summary disposition.

Forcing a utility to pay for relocating its facilities under such circumstances bears no relationship to the rationale and purposes underlying the common law rule, and instead subjects utilities statewide to the possibility that they (and their customers statewide) will repeatedly be asked to bear the expense associated with relocating utility facilities in accordance with whatever the current local government decision makers believe will make their cities more attractive. Instead, such forced payment is nothing more than the transfer onto others of substantial costs in name of enhancing the ability of a comparative few to enjoy more pleasant surroundings. However, the "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co v Mahon, 260 US 393, 416; 43 S Ct 158; 67 L Ed 322 (1922) (Holmes, J.).

V. CONCLUSION

The "reasonable control" reserved to local governments over their streets and highways is not unlimited. Because utilities such as Detroit Edison and telecommunication providers such as members of TAM are also heavily regulated by the state, it is insufficient to resolve relocation cost cases by taking only a cursory glance at the regulatory scheme and then proceeding to apply a test that is divorced from the existing legislative framework. But this is what the Court of Appeals did.

TAM requests that this Court follow the lead of other courts and expressly reject the Court of Appeals' governmental/proprietary function test. If another test is to be fashioned, TAM requests that that test provide that, in the absence of a contrary rule in statutes or other pronouncements that have the effect of law (e.g., agency rules), utilities may be required to pay

relocation expenses only when a municipality demonstrates that relocation of the utility's facilities in public right-of-way is necessary (i.e. essential) to accommodate other public uses of the right-of-way or to protect public health or safety.

Respectfully submitted,

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December 1, 2005

LANSING 34060-88 367486v5